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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 877

EDGAR I. SHOTE, JR., *Appellant*,

v.

STATE OF OHIO, *Appellee*.

On Appeal From the Supreme Court of the State of Ohio

PETITION FOR REHEARING

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On May 13, 1963, in a per curiam opinion in which Mr. Justice Black dissented, this appeal of Edgar I. Shott, Jr., was dismissed and his petition for a writ of certiorari denied. In his original appeal appellant relied principally on the contention that the statute was so vaguely indefinite that it failed to provide notice to appellant that his conduct was unlawful; and furthermore, as applied by the Ohio courts, it improperly and unconstitutionally placed the burden of proof upon appellant and created an invalid statutory presumption.

QUESTION PRESENTED ON REHEARING

In this criminal case for a technical violation of the Ohio Securities Law, where the prosecution produced no evidence whatsoever that was not consistent with the innocence of the appellant, the prosecutor in his closing argument told the jury (over objection) that appellant's failure to take the stand showed his guilt because he failed to prove to the jury that his actions were "legal" and "complied with the law" and were not "illegal today." Previous to appellant's trial there had been widespread publicity connecting appellant with the indictment and conviction of a third party who had defrauded the public out of about $3,500,000.

The question is whether under these circumstances, due process is denied by the statement of the prosecutor that the appellant must be guilty because he failed to prove that his actions were "legal" or to disprove the fact that they were "illegal today," a phrase which goes beyond the indictment and includes the adverse publicity current at the time of the trial linking the defendant to the fraud of a third party.

RESTATEMENT OF THE CASE ON REHEARING

In his petition for rehearing appellant desires to present an additional consideration which we think demonstrates that appellant did not and could not get a fair trial in the Ohio courts. That consideration relates to the publicity which linked appellant Shott with the fraud of a defendant, one Stickler, who was tried in another case which was a cause celebre occupying the headlines of the Cincinnati papers for weeks prior to appellant Shott's trial. Stickler was the architect

of a Ponzi scheme to defraud Cincinnati investors. He would borrow money at rates of interest up to twenty-five percent; he would pay off the old loans with new money. His scheme finally collapsed but not until Stickler had taken more than $3,500,000 from credulous investors.

The indictment of Stickler came down in a blaze of publicity making headlines across the front pages of Cincinnati papers. As appears from the Appendix attached to this petition, the public was informed by the Cincinnati papers as follows:

> "The Hamilton County grand jury today indicted four persons for participation in the $3.5 million loan kiting scheme reportedly created by Leslie Stickler, of 6825 West Farm Acres Drive, Amberley Village."

Appellant Shott's picture was placed under Stickler's as a party to this fraud. The *Cincinnati Enquirer* carried a headline:

> "Lawyers charged in $4 million fraud here. FBI asserts hundreds hit in phony scheme."

The publicity continued day after day. In a large part of this publicity appellant Shott was directly connected by the newspapers with Stickler. Therefore, at the time this case was tried, appellant Shott was clearly identified in the public mind as a participant in a monumental scheme to defraud.

One week before appellant Shott's trial, Stickler was tried and convicted. Witnesses whose testimony was widely publicized identified Shott as one of the persons who was gathering money for Stickler. For ex-

ample, a witness in Stickler's trial was reported to have testified as follows:

> "Steffen testified that he gave Stickler $5,000 in cash for the second note. *He said he first started investing money with Shott and knew that Shott was turning the money over to Stickler.* The money, he understood, was being loaned to contractors in Lebanon, Portsmouth and Columbus, who were willing to pay a high percentage of interest for funds to finish their building.
>
> "He switched to Stickler, Steffen testified, because he understood that Shott 'was supposed to have said he was now paying everybody off,' and because he, Steffen, wanted to eliminate the 'middle man.' Steffen claimed that he and Shott had been splitting 35% interest on the money."

Four people were indicted in the state criminal action: Stickler himself; Edgar I. Shott, Jr., the appellant in this case; John Ruf, a bookkeeper; and Richard Brauer. The front page newspaper story concerning these four indictments read in part as follows:

> "Stickler is believed to have borrowed money to cover earlier loans and to have promised high interest rates in order to get it. He repaid old loans—at high interest—by borrowing more and more money at rates ranging up to 25 per cent. Some of these loans—supposedly made as investments with Stickler—were arranged by intermediaries. *The three men indicted with Stickler today are accused of being the go-betweens.*
>
> "C. Watson Hover, prosecutor, says his office called more than 50 witnesses before the grand jury. The cases in the indictments brought today, he said, involve transactions of about $250,000."

If the Court will examine the contemporary clippings which we have set out in the Appendix to this petition, it could only conclude that at the time of appellant Shott's trial, the public and presumably the jurors must have got the general impression that Shott participated with Stickler in defrauding the public.

However, Shott was not charged with participating in the notorious fraudulent scheme of Stickler. Nor was there a scintilla of evidence to that effect other than the impression given in the press from the fact that he had been indicted along with Stickler. Indeed, he was totally unaware of Stickler's machinations. Shott himself lost more than $70,000 in loans that he had, in good faith, placed with Stickler. All that the Shott indictment charged and all that the evidence showed was that Shott had borrowed money from a friend on a promissory note which he had repaid.

Therefore the only basis for the jury's impulse to convict appellant of a serious felony sufficient to support a sentence of one to five years in the penitentiary must have been the prosecutor's comment to the jury on Shott's failure to take the stand. Taken in connection with the publicity which the jury must have read, this highly emotional comment could only mean one thing, and that was that Shott was unable to explain the legality or the propriety of his connection with Stickler's fraudulent scheme. That comment was:

> "Edgar Shott says by his plea of not guilty that the State of Ohio, that's us, and you, cannot convict him of this crime. He never once told you that it was legal. He never once told you that it complied with the law. He just said, 'You can't get me; you can't convict me.' That is what he said.

"Now, if this were legal, if this were a promissory note, if it was legal when he issued it in September of 1960, isn't it just as legal today? It most certainly is. So I suggest to you, if it was legal and he thought it was legal in September of 1960, he thinks it's legal today; and if he thinks it's legal today, or yesterday, why doesn't Edgar I. Shott, why doesn't this Defendant, charged with these crimes, take that witness stand and tell you? Why doesn't he say, 'Members of the jury, I am a lawyer; I am a criminal lawyer that knows the law; I examined this law in September, and any other time that I had dealings, and I say it was legal, and I say to you today it was legal.' Why doesn't he do that if it was legal? Why doesn't he do that? No, he chooses to sit there; deny, yes, deny, that the state can convict him. But will he look you in the eye; will he stand up and say to you 'Members of the jury, what I did was proper?' He wll not. He has not. He refuses to. At this point, he will not stand up and tell you. Why won't he tell you? Because it's illegal today, and it was illegal in September of 1960." (Tr. Trans., pp. 49-50).

We are not contesting here the principle that it is a violation of the Federal Constitution for a state to permit its prosecutors to comment on the failure of a defendant to take the stand (*Cf., Adamson* v. *California*, 332 U.S. 46 (1947); *but cf., Malloy* v. *Hogan*, No. 1031, certiorari granted, June 1, 1963). We are suggesting, however, that this is a dangerous principle and should be limited to cases where there is evidence to be explained which is clearly inconsistent with the defendant's innocence. In this case there is *nothing* in the entire record which is inconsistent with the innocence of the defendant.

Failure to take the stand should not, and cannot under *Adamson, id.* at p. 58, constitute the sole basis

for sustaining a conviction. There must be something in the record inconsistent with the innocence of the defendant to support a conviction in a felony case. Here there is nothing. But at the very least, and this is the point we make on rehearing, in a cause celebre accompanied by widespread publicity where the newspapers' publicity may have given the jury reason to believe that the defendant might have been engaged in a criminal conspiracy, the prosecutor should not be able to ask for a conviction for the following reason:

> "But will he look you in the eye; will he stand up and say to you 'Members of the jury, what I did was proper?' He will not. He has not. He refuses to. At this point, he will not stand up and tell you. Why won't he tell you? *Because it's illegal today,* and it was illegal in September of 1960." (Tr. Trans. p. 50).

The underlined phrase can only refer to the transactions which appeared in the newspapers after the exposure of Stickler. It cannot refer to anything in the indictment. It is particularly important that in the case of great publicity that comment upon the defendant's failure to take the stand should not be so broad as to condemn him for not explaining matters beyond the scope even of the indictment and which the jury could only have learned of through the newspapers.

CONCLUSION AND CERTIFICATE

For the foregoing reasons, the Petition for Rehearing should be granted, appellee's motion to dismiss denied, and probable jurisdiction noted. This Petition is presented in good faith and not for delay.

Respectfully submitted,

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